

REX v. G. A. PHILLIPS

[A. Cr. J. (Whitley Ag. C.J.) April 17, 1936]

[Singapore Special Case No. 8 of 1935]

[Criminal District Court Case No. 1103 of 1935]

Evidence Ordinance, s.132(2) and (3) — Answers given by debtor at his public examination in bankruptcy — Admissibility in subsequent criminal proceedings against debtor.

In the course of the public examination in bankruptcy of a debtor, the debtor is not entitled to refuse to answer questions put to him on the ground that the answers thereto may incriminate him. His answers to such questions can be used as evidence against him in criminal as well as civil proceedings.

SPECIAL CASE STATED.

Worley (Deputy Public Prosecutor) for the Crown.

The facts and arguments are fully set out in the judgment.

Cur. Adv. Vult.

Whitley Ag. C.J.: This was a special case stated by the District Judge, Singapore, under section 310 of the Criminal Procedure Code.

From the case stated it appeared that one Godfrey Ambrose Phillips was charged before the District Court, Singapore, with having within four months of his being adjudicated a bankrupt mutilated, destroyed or concealed documents relating to his property or affairs, an offence under section 107(1)(i) of Ordinance No. 44 (Bankruptcy).

At the hearing it was proved that:—

- (a) A receiving order was made against defendant on 23rd August, 1935.
- (b) His public examination was held on 11th October, 1935.
- (c) The only books of account delivered by defendant to the Official Assignee were some pages apparently torn from a ledger.

The Official Assignee tendered in evidence the notes of the public examination taken by the Registrar in order to prove that the defendant in his examination swore that he had thrown his account books into the river.

This evidence was held to be inadmissible in view of section 132(2) and (3) of the Evidence Ordinance inasmuch as since the record made by the Registrar did not show that the Judge had invited the attention of defendant to the said sections it must be presumed he failed to do so.

The Official Assignee contended that a bankrupt giving evidence at his public examination is not a witness within the meaning of section 132 of the Evidence Ordinance.

The question stated for the opinion of the Court was whether the refusal to admit this evidence was correct in law.

The defendant was convicted on the other evidence so that my decision on the case stated does not affect the result of the case, but as it raises a question of some importance I have thought it desirable to give a written judgment.

A Section 132 of the Evidence Ordinance reads as follows:

(1) A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit, or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind, or that it will establish or tend to establish that he owes a debt or is otherwise subject to a civil suit at the instance of His Majesty or of any other person.

B (2) No answer which a witness shall be compeller by the Court to give shall subject him to any arrest or prosecution, or be proved against him in any [132] criminal proceeding, except a prosecution for giving false evidence by such answer.

C (3) Before compelling a witness to answer a question the answer to which will criminate or may tend directly or indirectly to criminate such witness, the Court shall explain to the witness the purport of subsection (2).

D It is to be observed that the section uses the word "compelled" and it would appear that a distinction is drawn between those cases in which a witness voluntarily answers a question and those in which he is compelled to answer, giving him a protection in the latter of these cases only. The corresponding section in the Indian Evidence Act which is substantially the same as ours has been considered in a number of cases in India and the view taken has generally been that as the words stand they presuppose an objection by the witness which has been overruled by the Judge, and a constraint put upon the witness to answer the particular question.

E It is however in my opinion not necessary to decide the question raised by the present case upon the wording of section 132 by itself inasmuch as that section deals with incriminatory answers by an ordinary witness whereas we are here dealing with answers by a bankrupt in the course of his public examination, a proceeding which is specifically covered by section 17 of Ordinance No. 44 (Bankruptcy). I would refer particularly to the following subsections:—

G (1) Where the Court makes a receiving order, it shall hold a public sitting on a day to be appointed by the Court for the examination of the debtor, and the debtor shall attend thereat, and shall be examined before a Judge in open Court as to his conduct, dealings and property.

(6) The Court may put such questions to the debtor as it thinks expedient.

(7) The debtor shall be examined upon oath, and it shall be his duty to answer all such questions as the Court puts or allows to be put to him.

H (8) Such notes of the examination as the Court thinks proper shall be taken down in writing by the Registrar or Deputy Registrar and shall be read over to and signed by the debtor, and may thereafter be used in evidence against him.

I Section 124 of the same Ordinance makes a certified copy of such notes receivable in evidence in all legal proceedings whatever.

It is to be noted that it is thus the duty of the debtor to answer all such questions as to his conduct as the Court allows to be put and that it is provided that his answers may thereafter be used in evidence against him. It is clearly established by a number of cases in England such answers can be used as evidence

against the debtor in criminal as well as in civil proceedings and as section 17 of our Ordinance has been taken from section 15 of the English Act with only one variation which does not affect the point under consideration it follows, I think, that the law must be the same here.

In *R. v. Sloggett*, 7 Cox. C.C. 139 Cresswell J. in the course of his judgment observed that to a certain extent the 117th section of the old Bankruptcy Act (from which section 15 of the present Act was taken) had taken away from a bankrupt under examination before a commissioner, the ordinary privilege of a witness — that of refusing to answer questions which might tend to criminate. In *Rex v. Benjamin Scott*, 7 Cox C.C. 164 it was held by the Court of Criminal Appeal that the examination of a bankrupt in the Court of Bankruptcy touching his trade dealings and estate was admissible in evidence against him upon a criminal charge though the answers might have been extracted from him under threat of committal and might be criminatory of himself. The case was followed in *R. v. Hillam*, 12 Cox C.C. 174 which was decided under the 1869 Act. In the old Acts it was provided that the bankrupt should be examined as to his "trade dealings and estate." Under the provisions of section 15 of the 1914 Act he is to be examined as to his "conduct dealings and property" these words being the same as those used in section 17 of our Ordinance. The question of what is covered by the word "conduct" in section 15 of the English Act was considered by the Court of Appeal in *In re Paget*, [1927] 2 Ch. 85. In his judgment, Lord Hanworth M.R. laid it down that the object of the examination is not merely for the purpose of collecting debts or ascertaining what sum is available but also for the purpose of the protection of the public and that there shall be a full and searching examination as to what has been the conduct of the debtor in order that a full report may be made to the Court. He went on to say that he agreed with the decision of Phillimore J. in *In re Atherton*, [1912] 2 K.B. 251 that in the course of the public examination of a debtor the debtor is not entitled to refuse to answer to questions put to him on the ground that the answers thereto may incriminate him.

The attention of the learned District Judge was not drawn to any of these decisions and it seems to me that if they had been brought to his notice he would probably have admitted the evidence.

The answer to the question submitted in the case stated must be that the evidence was admissible and should not have been excluded.

Judgment accordingly.

[133] **SHAIK SAHIED BIN ABDULLAH BAJARAI v.
TAN BOON GUAN**

[O.C.J. (Barrett-Lennard J.) August 31, 1920]
[Singapore Suit No. 141 of 1920]

Mortgage — Assignment of equity — Notice by assignee of intention to redeem — Sale to third party by mortgagee notwithstanding notice.

A notice of intention to redeem does not suspend the exercise by the mortgagee of his powers of sale unless accom-

panied by a tender of the debt due subject to the performance by the mortgagee of his correlative obligations.

A claim for interest in lieu of notice intimates a present intention to waive any power of sale vested in the mortgagee during the period covered by the claim.

The mortgagee can, however, revive his power of sale at any time by serving a reasonable notice of his intention to exercise it on the mortgagor. If the conduct of the mortgagee justifies the impression that time is not of the essence of the right to keep the power of sale in abeyance, he cannot, after the notice to redeem has run out, sell the mortgaged property without first giving the mortgagor reasonable notice.

TRIAL OF ACTION.

Koek (Snr.) for the plaintiff.

G. S. Carver and W. L. Stevens for the defendant.

The plaintiff who was the assignee of an equity of redemption in certain land gave notice to the mortgagee of his intention of paying off the mortgage and enquired what was the amount due thereunder. On 20th of November, 1919 the mortgagee's solicitors forwarded to the plaintiff's solicitors an account including therein 3 months' interest in lieu of notice, and lent them the title deeds relating to the property. The plaintiff, however, deferred payment until after the expiration of the 3 months from which the interest was claimed. On the 18th February, 1920, the plaintiff's solicitors returned to the defendant's solicitors the title deeds together with a draft release and by a letter which accompanied the deeds stated that the amount claimed by the defendant was in their hands. The defendant's solicitors did not approve the draft release, and on the 27th February defendant instructed his solicitors not to proceed any further since he had sold the property and notice of this fact was given to plaintiff on the 3rd March. The plaintiff thereupon brought an action for a declaration that the contract to sell the property was invalid against the plaintiff and for an injunction restraining defendant from proceeding with the sale.

Barrett-Lennard J.: This action is brought by the plaintiff, as the assignee of the equity of redemption in certain land containing about 7 acres and 32 poles, and situate in Paya Lebar, Singapore, for (a) redemption of two mortgages, (b) a declaration that a contract for sale dated the 27th of February, 1920 entered into by the defendant with one Lee Hoon Leong in purported exercise of the power of sale vested in him as the mortgagee, is invalid as against the plaintiff, and (c) an injunction to restrain the defendant from proceeding with the sale. The case was argued in an exhaustive and able manner and I am much indebted to the learned counsel for the assistance rendered. The facts, with one exception, are not in dispute. The exception is that the plaintiff affirms, and the defendant denies, that the defendant was, or is, a mortgagee in possession. In my judgment it is clear that subject to the sale contract which purports to confer the right to possession on the purchaser as from the 15th of March, 1920, the defendant was not and is not such a mortgagee. The oral evidence shows I think that, in spite of the contract, the original mortgagor is at present the occupant of the land and in receipt of such produce rubber and coconuts — as it yields. Thus, no order can under any circumstances be made in accordance with the